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DAVID E. JANSSEN
Chief Administrative Officer

August 28, 2003

To: Supervisor Yvonne Brathwaite Burke, Chair
Supervisor Gloria Molina
Supervisor Zev Yaroslavsky
Supervisor Don Knabe
Supervisor Michael D. Antonovich

From: David E. Janssen
Chief Administrative Officer

STATE LEGISLATIVE UPDATE

Legislation of County Interest

AB 23 (Nation), as amended on August 26, 2003, would exclude transfers of real property between unrelated individuals and business partners from the change of ownership requirements of the California Constitution. The practical effect of AB 23 would be to allow the transfer of ownership of property without triggering a re-assessment when a joint tenancy has been established.

The Assessor is opposed to AB 23 because it could result in significant revenue losses to the County by allowing reassessment to be avoided among unrelated individuals, including business partners. The Assessor also objects to the bill based on a County Counsel letter brief to the Board of Equalization asserting that the proposed change is unconstitutional. The Assessor's letter of opposition is attached.

The Assessor estimates that revenue losses would exceed $45 million in the first year, growing to $75 million in the second year, and $105 million by the third year as estate planners and tax attorneys advise clients of this new exclusion. Previously, AB 23 was a bill related to women's health and breast cancer which had passed the Assembly and was awaiting action in the Senate. AB 23 is now pending in the Senate Rules Committee, and is expected to be considered on September 1, 2003.

Workers' Compensation Conference Committee

Over the past two days, the Conference Committee convened two meetings to hear from interested parties about the causes of the Workers' Compensation crisis, and gather information on proposed solutions. Among those testifying were Insurance Commissioner John Garamendi, Herb Schultz, the Governor's point person on Workers' Compensation, and CAO Risk Management staff, who also testified on behalf of CSAC and the League of Cities. The County was the only public employer invited to provide testimony. Many of the solutions suggested to the Committee are consistent with the County's key reform priorities such as linking the Workers' Compensation medical fees to what Medicare pays. However, not all witnesses were able to testify, so the committee will reconvene at some point, although it is not clear when that may occur.

Health Care Coverage Conference Committee

The Health Care Coverage Conference Committee, which was expected to convene last week, has not met this week. Our Sacramento Advocates have learned that there is a lot of behind-the-scenes work underway on a revised version of **County-supported SB 2 (Burton)**, the "pay or play" employer mandate coverage bill. The California Association of Public Hospitals is seeking language in the package which holds public hospitals harmless from Medi-Cal funding reductions. The Committee is expected to convene next week.

Pursuit of Position on Legislation

County-opposed AB 1531 (Longville), which would have required three elections, two primary and one general, in presidential election years, was amended on August 25, 2003 to require the State to pay expenses incurred by local elections officials for the October 7, 2003, special recall election. The Registrar-Recorder/County Clerk recommends that the County drop its opposition and support the amended version of AB 1531 because of its favorable fiscal impact on the County. Support for this measure is consistent with general County policy to support proposals that reimburse the County for election costs and reduce the overall cost for the recall. **Therefore, our Sacramento advocates will support AB 1531**. This measure is currently at the Senate Desk awaiting referral to a committee.

SB 418 (Sher), as amended on August 21, 2003, would repeal and replace existing law regarding the process by which an agency obtains an agreement from the State Department of Fish and Game (DFG) for the alteration of a streambed.

Existing law provides that private parties and governmental agencies enter into a Streambed Alteration Agreement with DFG when they undertake activities that may affect fish and wildlife resources. The law requires that an agency provide notification to DFG that it intends to construct a project that may impact fish and wildlife, and it establishes a process for entering into an agreement, if one is needed. The law also sets the maximum fees DFG can charge for processing the agreement, at $2,400.

SB 418 establishes a new notification and agreement process. Among other things, the bill; requires DFG to issue a draft agreement within 60 days of giving notice to an agency that its notification is complete; authorizes DFG to set its own fees, with a maximum of $5,000; and, allows a court to issue a temporary restraining order (TRO), or injunction, without DFG having to prove or allege that there will be irreparable damage to fish and wildlife, or that there are no other legal remedies available. Finally, the bill provides that there will be no State reimbursement for the new mandates it creates.

The Department of Public Works (DPW) reports that it has a number of Streambed Alteration Agreements covering flood control activities, such as reservoir cleanout and dam rehabilitation projects. DPW believes the existing law is working and is concerned about several provisions of SB 418, including the one that would require DFG to respond within 60 days of determining that an agency's project notification is "complete". DPW believes this will allow DFG to delay projects indefinitely because a project is controversial or objectionable to the DFG staff person reviewing the notification. DPW is also concerned about allowing DFG to raise its fees to $5,000, potentially increasing the County's costs.

Of particular concern to DPW and County Counsel is the provision that would allow DFG to obtain a TRO, or injunction, against a project without having to allege or prove that there will be irreparable harm to fish and wildlife, or that there is no other legal remedy. County Counsel is unaware of any precedent for a public agency getting injunctive relief without proving such basic elements. The law clearly maintains that the applicant for a TRO or injunction bears the burden of proof, including that: the applicant would prevail on the merits at trial; the harm to the applicant, if the TRO or injunction is not issued, outweighs the harm to the respondent, if it is issued; and that there is no other means of adequate relief, such as monetary damages. The burden of proof has traditionally been very high and judges have been given discretion in determining the "balance of equities", because there is no time for discovery or trial and no jury is involved. Therefore, TRO's and injunctions have not been favored remedies. SB 418 would reverse this, taking almost all discretion away from the courts, making TRO's and injunctions the favored remedy. In effect, SB 418 would deny the traditional legal concept of "equity", taking away the respondent's ability to present facts that there will be no irreparable harm, or that there are viable alternative remedies, or that issuing the TRO or injunctions would violate the notion of "balance".

DPW is opposed to SB 418 because the bill could allow DFG to unreasonably delay, or even stop, a project that is needed to protect lives and property, simply because the project is controversial or objectionable to DFG. County Counsel is opposed to SB 418 because the provisions relating to TRO's and injunctions set a precedent that could threaten any number of important public works and private development projects. **Therefore, our Sacramento advocates will oppose SB 418.**

SB 418 passed the Senate on May 29, 2003 by a vote of 23 to 15. The bill is in the Assembly Appropriations Committee, where it is scheduled to be heard on August 29, 2003.

According to the latest committee staff analysis, only DFG supports SB 418. Opposition to the bill includes: the California State Association of Counties (CSAC), San Diego County, the California Central Valley Flood Control Association, the Central Delta Water Agency, the Sierra Club, Friends of the River, the California Native Plant Society, Trout Unlimited, and the California Oaks Foundation.

SB 976 (Ducheny), as amended on June 26, 2003, would amend the Budget Act of 2002 by reverting $5,713,000 from the Harbors and Watercraft Fund to the Public Beach Restoration Fund and authorize the transfer of the moneys for expenditure pursuant to the California Public Beach Restoration Act.

According to an Assembly Appropriations Committee staff analysis, SB 976 will provide the funds appropriated in the 2002 Budget for grants to fund beach restoration projects. Of the total, $4.2 million is for a project at Imperial Beach in San Diego County. The remaining funds are divided among nine other projects, including $183,000 for Los Angeles County's cost share of the Army Corps of Engineers' "Coast of California Storm and Tidal Wave Study", for the Los Angeles region.

The Department of Beaches and Harbors is supportive of SB 976. Support for SB 976 is consistent with Board policy to support legislation that provides funding for beach erosion and accretion monitoring and beach sand replenishment, including full funding of the Public Beach Restoration Act of 1999 (AB 64). **Therefore, our Sacramento advocates will support SB 976.**

SB 976 is currently being held in the Assembly Committee on Appropriations Suspense File. According to an Assembly Committee on Natural Resources staff analysis, SB 976 is supported by the cities of Encinitas, Imperial Beach, and Solana Beach, as well as the San Diego Association of Governments and the Shoreline Preservation Committee. There was no opposition when the Committee's June 30, 2003 staff report was written.

Status of County-Interest Legislation

County-support and amend AB 490 (Steinberg), which seeks to ensure all students in foster care have the opportunity to meet the same academic achievement standards as other students, and are placed in the least restrictive educational program with access to the same academic resources and services as other pupils, was amended on August 19, 2003 and placed on the Senate Appropriations Suspense File on August 25, 2003.

The August 19, 2003 amendments delete the requirement for State reimbursement for costs incurred by the bill by assuming that the costs will be born by the Federal

government via the McKinney-Vento Homeless Assistance Act. Should the Department of Children and Family Services (DCFS) incur transportation costs as a result of AB 490, McKinney-Vento funds would be unavailable to DCFS because these funds are only available to local educational agencies (LEAs), and there is no current mechanism for the transfer of funds from LEAs to DCFS. It is also not clear that foster children would meet the criteria for homelessness as defined in the Federal law.

In the August 1, 2003 State Legislative Update, we indicated that the July 23, 2003 amendments to AB 490 were silent on the issue of which agency/individuals would ultimately be held responsible for transportation costs, and that our Sacramento advocates would seek amendments to avoid the bill becoming an unfunded mandate. Based on the most recent amendments that shift financial responsibility for costs incurred

by the bill from the State to the Federal government, our Sacramento advocates will continue to seek amendments to avoid the bill becoming an unfunded mandate. AB 490 is currently set for hearing on Friday, August 29, 2003 in the Senate Appropriations Committee.

We will continue to keep you advised.

DEJ:GK
MAL:JR:DS:EW:ib

Attachment

c: Executive Officer, Board of Supervisors
County Counsel
Local 660
All Department Heads
Legislative Strategist
Coalition of County Unions
California Contract Cities Association
Independent Cities Association
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Attachment

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RICK AUERBACH
ASSESSOR

August 28, 2003

Honorable Gilbert Cedillo
Chairman, Senate Revenue & Taxation Committee
State Capitol, Room 3048
Sacramento, CA 95814

Dear Senator Cedillo:

AB 23 (Nation) OPPOSE

I am writing to express my opposition to AB 23. As Assessor, I am opposed to the bill primarily on legal grounds. I urge your opposition for this reason and for its significant revenue impact on the State, schools and the other jurisdictions that rely on property tax revenue.

Legal Argument

The language in AB 23 is similar to that being proposed as an amendment to Property Tax Rule 462.040 currently before the State Board of Equalization (BOE). In response to this proposed amendment, our County Counsel submitted a letter to the members of the BOE in opposition. I have attached that letter for your information. In particular, I would turn your attention to page 10, paragraph C which states:

> The Proposed Amendment to Rule 462.040 is Unconstitutional as it Creates an Irrational Distinction that Violates the "Change in Ownership" Requirement of the California Constitution.

County Counsel also concludes that the point of the proposed rule change is to create a loophole in California Property Tax Law. AB 23 would codify into law this loophole, resulting in significant revenue losses.

Revenue Impact

While my primary concern as Assessor is the application of the law in a fair and equitable manner, one cannot ignore the revenue impact of this bill. The potential exists for the exclusion of transfers between unrelated individuals, even business partners. In Los Angeles County alone, there were 238,000 reappraisable transfers for the 2003 assessment roll resulting in approximately **$400 million** in additional property tax revenue. We believe that with the passage of AB 23, as many as 30,000 transfers could be excluded from reappraisal. Many of the properties would be homes, but

it would also include apartments, office buildings and industrial properties. With an average of over $1,500 in additional revenue produced from each transfer, the loss in Los Angeles County could be as high as **$45 million** the first year. As this effect compounds, except for supplemental assessment revenue, the loss could reach nearly **$75 million** in the second year, **$105 million** in the third year, and will continue to grow. Statewide, the effect would be approximately triple. Plus, the number of excluded transfers will likely increase in future years as estate planners and tax attorneys advise property owners on this new exclusion.

Again, I strongly oppose AB 23 on legal grounds. I urge you and your colleagues to oppose AB 23 for this reason and to also consider the significant revenue impact.

Please call me if you have any questions or your staff may contact Barry Bosscher, Special Assistant, at (213) 974-3101.

Sincerely,

RICK AUERBACH

RA:bb

attachment

c: Members, Senate Revenue and Taxation Committee
Assemblyman Joe Nation
Joan Thayer, President, California Assessors' Association (CAA)
Ken Stieger, Chair, CAA Legislative Committee
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Re: Letter Brief in Opposition to the Proposed Amendments to Property Tax Rule 462.040 and 462.240(k);
Change in Ownership Provisions Re: Domestic Partnerships.

Dear Chairwoman Migden and Members of the Board:

We write this letter on behalf of the Los Angeles County Assessor's Office, and Rick Auerbach, Assessor, in opposition to the proposed Amendments to Property Tax Rules 462.040 and 462.240(k).

TABLE OF CONTENTS

Page

Introduction 2

A. Proposed Rule 462.240(k) is Unconstitutional 2

B. The Proposed Amendment to Rule 462.040 is both Contrary to Statute and Unconstitutional. 2

1. The Point of the Proposed Regulation is to Create a Loophole in California Property Tax Law 3

   a. The Policy Justification for Excluding the Creation of a Joint Tenancy from Reassessment is the Element of Contingency 4

   b. Upon the Irrevocability of a Family Joint Tenancy Transfer, a Full Reassessment is Required. 4

   c. Proposed Example 13 is the Key to Understanding the Loophole. . . . 5

2. Board Legal Staff has Previously Opined that California Law Requires the Addition of a Third-Party as a Prerequisite to Applying an an "Original Transferor" Analysis; the Staff's Previous Legal Conclusion Should be Respected, the Law has Not Changed Since that Opinion was Rendered 6

C. The Proposed Amendment to Rule 462.040 is Unconstitutional as it Creates an Irrational Distinction that Violates the "Change in Ownership" Requirement of the California Constitution. 10

1. The term "original transferor" is a code word for a property owner exempted from reassessment. 10

D. The BOE's Meta-purpose for the Proposed Regulation is to Bootleg a Reassessment Exclusion for Domestic Partner Transfers Analogous to the Exclusion Presently Applicable to Interspousal Transfers; this Goal Requires an Express Constitutional Amendment. 11

E. The Proposed Amendment to Rule 462.040 Does Not Meet the Threshold Requirements of California Administrative Law. 11

1. Title 18 Rule 462.040 does not meet the Consistency element required of a proposed Regulation. 11

2. Title 18 Rule 462.040 does not meet the Clarity element required of a proposed Regulation. 13

Conclusion 14

Introduction

The State Board of Equalization has the authority to enact rules to promote uniform assessment practices. (Government Code §15606.) However, such rules must conform with California law. (Hahn v. SBE (1999) 73 Cal.App.4th 985, 996-997.) The proposed rule amendments presently before the Board (the "Proposed Regulations") violate the constitutional requirement that property be reassessed upon change in ownership, and are impermissibly arbitrary. (Cal. Const. art. 13A, sec. 2.) The Proposed Regulations do not conform with California statutory law. In addition, Proposed Regulation 462.040 violates California administrative law as it is both unclear and inconsistent.

A. Proposed Rule 462.240(k) is Unconstitutional.

The California Constitution, article 13, section 2(a) provides that property is to be reappraised upon change in ownership. Contemporaneous with the passage of Proposition 13, the Legislature defined the change in ownership of property to mean the transfer of a present, beneficial interest in property, substantially equivalent to a fee interest. (Cal.Rev. & Tax. Code, section 60; Pacific Southwest Realty v. County of Los Angeles (1991) 1 Cal.4th 155, 162.) Notwithstanding this general definition, the Constitution specifically excludes interspousal reassessments from reassessment. (Cal.Const. article 13, section 2(g); Cal. Rev. & Tax. Code §63.)

The proposed regulation seeks to expand the interspousal exemption to provide a similar exclusion for statutory domestic partners. However, the proposed amendment is unconstitutional and inconsistent with law. The term spouse has a commonly understood meaning, and does not include domestic partners. (California Family Code §11; Adams v. Howerton (1982) 673 F.2d 1036, 1040.) The Board's proposed regulation to exempt transfers between domestic partners from reassessment is unconstitutional. (Lundberg v. County of Alameda (1956) 46 Cal.2d 644, 648 [impermissible for the Legislature to exclude property from reassessment unless it is constitutionally authorized.])

B. The Proposed Amendment to Rule 462.040 is Contrary to Statute.

The California Constitution provides for the reassessment of property upon a change in ownership. Contemporaneous with the passage of Proposition 13, the Legislature defined a change in ownership of property to mean the transfer of a present, beneficial interest in property, substantially equivalent to a fee interest.

(Cal.Rev. & Tax. Code, section 60; Pacific Southwest Realty v. County of Los Angeles (1991) 1 Cal.4th 155, 162.) Notwithstanding this general definition, the California law provides an exclusion from reassessment for the creation of a joint tenancy interest. (Cal. Rev. & Tax. Code §65.)

When Proposition 13 was enacted, a blue ribbon Task Force on Property Tax Administration ("Task Force") was empaneled to recommend policy and legislation to implement the measure. With regard to joint tenancies, the Task Force observed the following:

> Probably the vast majority of joint tenancies in California (other than interspousal joint tenancies) are those in which a parent places his property in joint tenancy with children. The special aspect of a joint tenancy (as distinguished from tenancy-in-common) is that the surviving joint tenant (or joint tenants) succeeds to the entire property by operation of law on the death of the other joint tenant. For that reason joint tenancy is often used as a substitute for a will. The same consideration which justifies excusing the making of a will from change in ownership also supports exclusion of the creation of a joint tenancy where the transferor (e.g., a parent) is one of the joint tenants. The rights of the new joint tenants (e.g., the children) to obtain the entire property outright are contingent upon their surviving the transferor joint tenant. Creation of such joint tenancies is not a change in ownership, ***but the entire property is reappraised when the joint tenancy terminates***. . . .

(Report of the Task Force on Property Tax Administration, January 22, 1979, pp. 42-43; emphasis in original; ***emphasis*** added.)

Consistent with this scenario, California Revenue and Taxation Code section 65(b) provides that "[t]here shall be no change in ownership upon the creation of a joint tenancy interest if the transfer or transferors, after such creation are among the joint tenants." . . .

1. The Point of the Proposed Regulation is to Create a Loophole in California Property Tax Law.

The Proposed Regulations before the Board are advanced for the purpose of using the current law applicable to joint tenancies as the basis for excluding transfers between domestic partners from property tax reassessment. The exclusion relies upon the term of art "Original Transferor" (originating in Revenue and Taxation

Code section 65) as the lever to achieve the desired result. Under the California property tax law pertaining to joint tenancies, the creation of a joint tenancy does not require reassessment so long as one of the Original Transferors creating the joint tenancy remains on title. The issue that the family joint tenancy exclusion addresses is that these arrangements have aspects of contingent vesting that for purposes of property tax become a present and irrevocable property interest at a future time. The proposed amendment to Rule 462.040 seeks to capitalize upon the statutory special treatment for transfers into family joint tenancies to provide through the Proposed Regulations that transfers between joint tenants (eg., between domestic partners) be deemed those of Original Transferors (i.e., contingent transfers), such that they are **never** reassessed. (Cf. Proposed Rule 462.040, example 13.) The result sought to be accomplished by the Proposed Regulations is illegal unless California's Constitution is first amended.

a. The Justification for Excluding the Creation of a Joint Tenancy from Reassessment is the Element of Contingency.

The Task Force made clear in its report, that the policy basis for excluding the creation of a joint tenancy from reassessment is the element of contingency. The holding of property as joint tenants is an estate-planning device often used by those less sophisticated. ("Joint Tenancies Popular among Farm Couples, but can Create Tax Problems," Trusts and Estates, Aug. 1981, vol. 120, p. 11.) Assume a husband and a wife add their child to title as a joint tenant. The child's actual possession of the property is contingent upon surviving the parents' tenure on the property. Because joint tenancy is often used in "Mom and Pop" estate planning, the Legislature deemed this to be effectively a testamentary transfer, and that in light of presumed family dynamics that would allow for an interim rescission of the arrangement, the transfer only becoming irrevocable and reassessable for property tax purposes upon the death of both parents.

b. Upon the Irrevocability of a Family Joint Tenancy Transfer, a Full Reassessment is Required.

The Legislature's policy with regard to joint tenancy is that the creation of a joint tenancy vesting adding third-party grantees is not a reassessable event. However, when the Original Transferors who establish the joint tenancy die, and the property vests in the third-parties, a full reassessment is required (unless the survivors are otherwise entitled to an exclusion from reassessment based upon some other provision of law.) The effect of removing from title the Original

Transferors who originally placed the property into the joint tenancy, is to irrevocably transfer the property to the third-parties. Thereupon, California law recognizes the now irrevocable vesting of the property in the surviving third-parties as a fully reassessable event, the element of contingency having been deemed removed.

c. Proposed Example 13 is the Key to Understanding the Loophole.

Example 13 of the proposed amendment to Rule 462.040 makes clear the unconstitutional nature of the Proposed Regulation. A and B hold title as joint tenants, and per the example are Original Transferors. A dies, and B vests by operation of law as 100% owner of the property. Notwithstanding that B previously owned only 50% of the property, and that he now owns an irrevocable and non-contingent 100% interest in the property, the example states that there is no change in ownership. **This result does not conform with California law and is unconstitutional.** (Cal. Const., art. 13A, sec. 2; Rev. & Tax. Code §60.)

In addition, the timing of these proposals are profoundly wrong. California faces an enormous financial challenge, yet rather than preserving the existing tax base, the Proposed Regulations will certainly shrink public resources. The following example is illustrative:

> B and S (brother and sister) own a property together as tenants-in-common. B seeks to buy out S's interest without incurring a property tax reassessment. He achieves his goal in the following manner. B and S record a deed transferring title from B and S tenants-in-common, to B and S joint tenants. (No reassessment; Rev.& Tax. Code §62(a)(2).) S then records a deed transferring her joint tenancy interest to B. (No reassessment; Proposed Reg. 462.040; ex. 13.)

The potential exclusion provided by example 13 may be applied to any transfer between joint tenants. Proposed reg. 462.040(e) purports to exclude its application to legal entities, but legal entities are already precluded from holding title as joint tenants on account of their perpetual life. (DeWitt v. San Francisco (1852) 2 Cal. 289, 297.)

2. Board Legal Staff has Previously Opined that California Law Requires the Addition of a Third-Party as a Prerequisite to Applying an "Original Transferor" Analysis; the Staff's Previous Legal Conclusion Should be Respected, the Law has Not Changed Since that Opinion was Rendered.

In March 1998, State Board Staff stated that the plain meaning of section 62 and section 65 required that in order to be deemed an original transferor (such as the parents in the Task Force's scenario) a third party must be added onto title (e.g., the adding of a child to title.) Staff's position was based upon the Legislature's interpretation of Change in Ownership that was developed contemporaneously with the passage of Proposition 13 – that the addition of a ***third party*** for estate-planning purposes was not a change in ownership. The staff's legal analysis, which describes the legislative policy for excluding transfers into joint tenancies from reassessment is adopted and set out below[1]:

II. Staff Recommendation

Staff recommends amending subdivision (b)(1) and adding a new example (Example 4) to illustrate that subdivision (b)(1) provides that joint tenants become "original transferors" only if they transfer to themselves and at least one other person as joint tenants, as required by Revenue and Taxation Code section 65, subdivision (b) which states

> (b) There shall be no change in ownership upon the creation or transfer of a joint tenancy interest if the transferor or transferors, after such creation or transfer, are among the joint tenants. Upon the creation of a joint tenancy interest described in this subdivision, the transferor or transferors shall be the "original transferor or transferors" for purposes of determining the property to be reappraised on subsequent transfers. The spouses of original transferors shall also be considered original

[1] From the staff report to the State Board of Equalization Property Tax Committee, for the hearing held on March 17, 1998, pertaining to §462.040, issue 1.

transferors within the meaning of this section.

. . .

IV. Background

The Proposition 13 Task Force Report ("Task Force Report") and the Proposition 13 Implementation Report ("Implementation Report")[2] indicate that the "original transferor" concept was a means of facilitating the creation of family joint tenancies by parents and children without triggering a change in ownership until both parents died.

The Task Force Report (pp. 43-44) recognized that most joint tenancies were created as estate-planning devices in which parents transferred real property into a joint tenancy with their children and, upon the death of the parents, title vested in the children by operation of law. For that reason, the legislature created the "original transferor" concept to allow for transfers in joint tenancy to family members - typically the children - without the property undergoing a change in ownership. (Implementation Report, pp. 20-21). Reappraisal would be delayed, but not completely avoided, until the termination of the interests of the parents who became the "original transferors" after the transfer. Thus, the rationale for "original transferor" status requires a transfer to the transferors and at least one other person.

The Implementation Report (p.22) also provided examples to show the operation of the "original transferor provisions" as follows:

> (2) Husband A purchases a home in 1968, and becomes the original transferor in 1976 by virtue of Wife B being added as a joint tenant. She also becomes an original transferor, as A's spouse. Son C is added as a joint tenant in 1980. Result: no reappraisal because original transferors remain as joint

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[2] The full titles of these reports are, respectively, Report of the Task Force on Property Tax Administration, January 22, 1979 and Implementation of Proposition 13, Volume 1, Property Tax Assessment, October 29, 1979.

tenants after the transfer. Son C subsequently transfers his interest wholly to his parents. Result: no reappraisal because interest of non-original transferor vested in original transferors.

(3) Original sole owner A (since 1976) creates a joint tenancy with B in 1979, resulting in A and B as joint tenants (note that B is NOT an original transferor). A then dies, leaving B as sole owner. Result: 100% reappraisal since the original transferor (A alone) held the entire portion of property prior to creation of the joint tenancy.

(4) Two friends, X and Y, purchase a small business as joint tenants in 1978. In 1980 they become co-original transferors by adding Y's spouse and associates R and S as co joint tenants. Result: no reappraisal.

These examples illustrate that transferors become "original transferors" only when joint tenancy interests are created in or transferred to the transferors and to persons in addition to the transferors.

V. Staff Recommendation

A. Description of the Staff Recommendation

Restricting creation of original transferor status only to transfers in which other persons are added as joint tenants reflects the statutory scheme that reappraisal of subsequent transfers should be delayed but not avoided completely. Once the transferors become "original transferors", the property does not undergo a change in ownership until the termination of the last "original transferor's" interest. If coowners are allowed to become "original transferors" by transferring only to themselves joint tenancies may be exploited as a means of completely avoiding change in ownership. For example, A owns property and transfers to B an undivided interest of less than 5 percent with a value of less than $10,000. A and B are now tenants-in-common but no reappraisal occurs because this transfer is "de minimis." They subsequently transfer to themselves as joint tenants and become "original transferors". A then transfers his interest to B with no reappraisal because both are original

transferors and title vests in another original transferor. This process could then be repeated without limit and the property would completely escape reappraisal.

Plain meaning of section 62 and section 65

Subdivision (f) of section 62 specifically excludes "the creation or transfer of a joint tenancy interest if the transferor, after the creation or transfer is one of the joint tenants as provided in subdivision (b) of Section 65." Subdivision (b) of section 65 provides, in pertinent part, that "there shall be no change in ownership upon the creation or transfer of a joint tenancy interest if the transferor or transferors, after such creation or transfer, are among the joint tenants. Upon the creation of a joint tenancy interest described in this subdivision, the transferor or transferors shall be the `original transferor or transferors' . . ." The phrases "one of the joint tenants" and "among the joint tenants" convey the meaning that after the creation or transfer, the transferor becomes part of a larger group of joint tenant transferees. Hence, both provisions indicate that a transferor acquires "original transferor" status only when persons other than the transferors are in the group of transferees.

This interpretation is supported by reading section 62, subdivision (f) in conjunction with subdivision (a)(1). Subdivision (a)(1) excludes "[a]ny transfer between coowners that results in a change in the method of holding title to the real property transferred without changing the proportional interests of the coowners in that real property, such as a partition of a tenancy in common." Clearly, subdivision (a)(1) excludes all proportional interest transfers, including transfers by coowners into a joint tenancy, without exception. Thus, section 62(f) and section 65(b) must apply to other than proportional interest transfers, that is, where the transferee group includes persons other than the transferors.

. . .

C. The Proposed Amendment to Rule 462.040 is Unconstitutional as it Creates an Irrational Distinction that Violates the "Change in Ownership" Requirement of the California Constitution.

The result sought by the State Board of Equalization is unconstitutional. The term "change in ownership" originates in the Constitution, and has been defined to mean the transfer of a present, beneficial property interest substantially equivalent to fee. (Rev. & Tax. Code §60.) The proposed amendment seeks to maintain a distinction in treatment between similarly situated property owners. Consider, for example, A and B holding title as tenants in common. A dies and his interest transfers (i.e., changes ownership for property tax purposes), and is reassessed. In contrast, C and D hold title as joint tenants, C dies, under the Proposed Rules D's acquisition of full ownership of the property is not a change in ownership, and does not undergo reassessment. (Proposed Regulation 462.040, example 13.)

Nonetheless, the Constitution flatly requires a reassessment upon change in ownership. The disparity in treatment between the two vestings implicit in the proposed regulation is arbitrary, unconstitutional, and irreconcilable with article 13A, section 2.

1. <u>The term "original transferor" is a code word for a property owner excluded from reassessment.</u>

At first blush, the provisions of California property tax law pertaining to joint tenancy are impenetrable. The analysis turns, however, on the concept that any creation of a joint tenancy vesting in which an "Original Transferor" remains on title is excluded from reassessment, because the transfer is conclusively presumed to be contingent. The proponents of the Proposed Regulation would exploit this statutorily-prescribed presumption, by declaring through the Proposed Regulation 462.040 that ambulatory transfers between co-tenants, such as by will or trust, may be presumed to be held in joint tenancy, that the parties to such an arrangement are "Original Transferors," and further prescribes that an Original Transferor is immunized from future reassessments so long as he remains on title.

In summary, where the Proposed Regulation describes a property owner as an "Original Transferor," this should be understood as a shorthand reference meaning that the owner is excluded from future reassessment. The result, however, is completely unauthorized under California law.

D. The BOE's Meta-purpose for the Proposed Regulation is to Bootleg a Reassessment Exclusion for Domestic Partner Transfers that is Analogous to the Exclusion presently applicable to Interspousal Transfers; this Goal Requires an Express Constitutional Amendment.

The Board seeks by these proposed rule amendments to facilitate tax avoidance by domestic partners and maintains that a third party need not be added to title in order for the grantor to be deemed an original transferor. The point of this development is to permit, in the event of a testamentary transfer, for a domestic partner to receive property in his or her capacity as an "original transferor" without incurring a reassessment, relying upon joint tenancy verbiage as the pretext for the result. The fact remains, however, that the Proposed Regulations have been introduced in tandem, and it is plainly apparent that their actual goal is to sanction the non-reassessment of substantive transfers between domestic partners.

Nonetheless, there should be no misunderstanding, the Assessor of the County of Los Angeles would not object to this result were it the properly enacted constitutional policy of this State. However, the interspousal exemption in California is limited by the Constitution to the conventional definition of husband and wife. Additionally, the exclusion for joint tenancies is a timing presumption that requires the reassessment of a joint tenancy transaction when it becomes indubitable that a present interest in property by been irrevocably transferred. In no event do the joint tenancy provisions of California law exclude transfers from reassessment; instead they prescribe the timing of those reassessments.

E. The Proposed Amendment to Rule 462.040 Does not Meet the Threshold Requirements of California Administrative Law.

1. Title 18 Rule 462.040 does not meet the Consistency element required of a proposed Regulation.

Please compare the following examples:

1) C and D hold title as joint tenants. D transfers his interest to C. Result, change in ownership of 50% of the property.

2) A and B hold title as joint tenants. A dies. Result, no change in ownership.

The differences in these results are inconsistent and irreconcilable, yet are drawn virtually verbatim from the Proposed Regulation. Compare section 462.040(a), example 3, with 462.040(b)(3), example 13. For purposes of OAL review, "'consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (OAL document, "How to Participate in the Rulemaking Process", p. 20, citing Govt. Code §11349(d)[3].) Were the Proposed Regulation to be enacted, it would have the force of law, yet it would be internally contradictory. The Proposed Rule fails to meet the required consistency standard.

Further, the proposed language of the amendment contradicts California statute. Civil code section 683 requires that a conveyance establishing a joint tenancy interest in real property must expressly provide for this treatment in the conveyancing document. (Please see Miller and Starr, California Real Estate, 3d. Edition, §12.22, "Requirement of a Writing," and the citations contained therein.) The proposed regulation is plainly inconsistent with this statutory requirement.

In addition, the Proposed Regulation is inconsistent with California law as it provides that virtually any ambulatory agreement (such as a will or revocable trust) may be recharacterized under the Proposed Regulation as a "joint tenancy" arrangement for purposes of property tax. (Proposed Regulation 462.040(b).) This text – foreign to the principles generally governing the vesting of title to real property – is highly ambiguous[4], and appears crafted solely as an exercise in

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[3] Available at http://www.oal.ca.gov/document/HowToParticipate.pdf

[4] For instance, Proposed Reg 462.040 provides that ". . . Any joint tenant may also become an original transferor by transferring his or her joint tenancy interest to the other joint tenant(s) through his or her trust if the trust instrument names the other joint tenant(s) as the present beneficiary or beneficiaries or through his or her will, if the will provisions name the other joint tenant(s) as the devisee(s)."

What in the world is this intended to communicate? Ordinarily a trust is considered as an alternative to a joint tenancy vesting. ("Determining the Advantages and Disadvantages of Joint Tenancy," Practical Lawyer, vol. 32, April 1986, p. 39, at p. 44.) Likewise, a will may convey joint tenancy interests but only after the testator has died. (Civil Code §683.) The proposed regulation is challenged on the alternative grounds of lack of consistency and lack of clarity.

administrative activism for the purpose of excluding certain transactions from reassessment. The Board has no power to exclude property transfers from reassessment unless authorized by statutory or constitutional provision.

2. Title 18 Rule 462.040 does not meet the Clarity element required of a proposed Regulation.

California assessors are required to administer the property tax consistent with law. In order to discharge this responsibility, the assessors must be able to discern what the law requires of them.

Proposed Regulations 462.040(b) and (d) provide that an assessor may find that virtually any transfer between co-tenants is in fact a joint tenancy arrangement. However, the standards that are to govern this analysis are not clearly prescribed in the Proposed Regulation. Rather, Proposed Regulation 462.040(d) provides that an assessor "may" consider whether "reasonable cause" exists to believe that the parties intended to create a joint tenancy.

In contrast, California statutory law specifically prescribes how to establish a joint tenancy, requiring its express creation in a conveyancing document. (Civil Code §683.) The Board would blithely disregard this law, and insert a grossly subjective element, to be determined independently and subjectively by each assessor, as to what constitutes "intent to create a joint tenancy."

As an example of how rudderless this scheme is, consider the reference in 462.040(d) to an "Affidavit of Death of Joint Tenant." Ordinarily, such an affidavit is recorded after the death of a joint tenant to give notice that the property interest of the decedent transferred by operation of law to the surviving joint tenants. The apparent purpose of proposed 462.040(d) is to sanction the recharacterization of title as a joint tenancy, where per official records the tenants would be otherwise vested as tenants-in-common.

The Proposed Regulation 462.040(d) appears to suggest that following the death of a tenant-in-common, the assessor may consider the subsequent filing by a surviving tenant of a "Affidavit of Death of Joint Tenant" as "reasonable cause" that the parties in fact held colorable title to the property as joint tenants for property tax purposes, and that the change in ownership is non-assessable. Proposed Regulation 462.040(d) would replace the objectivity of official property records with the subjectivity of anecdotal recitations and untethered assessor discretion.

Aside from being unconstitutional, and contrary to statute, the "reasonable cause" analysis that may be applied by the county assessor is absolutely unclear for purposes of administrative law. (Please see , OAL document, "How to Participate in the Rulemaking Process", p. 21, and the references therein to Govt. Code sec. 11349(c), and Tit. 1, Cal. Code of Regulations, section 16(b).)

Ironically, the touchstone of the Board's rulemaking power is the duty to enact rules that enhance the uniformity of assessment practices in the state. Were the proposed amendments to Rule 462.040 to be enacted, they would necessarily have a completely opposite result, in no small part because the Proposed Regulation is opaque as to what standards should govern an assessor in recharacterizing the vesting of property ownership from what is otherwise reflected in the official records.

Conclusion

The Proposed Regulations are unconstitutional, and contrary to statute. They should not be enacted.

Very truly yours,

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